

1992

H and B Carriers and Capital General Corporation v. Utah Securities Division and the Department of Business Regulation : Reply Brief

Utah Supreme Court

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BRIEF.

920180

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Following	:	
Issuers, their Securities,	:	
Affiliates or Successors,	:	APPELLANTS' REPLY BRIEF
and/or Entities subsequently	:	
organized by them, including	:	
H & B Carriers, Inc., et al.,	:	Docket No. 920180
Capital General Corporation,	:	Ct of App No. 910196-CA
	:	Priority No. 13.
Petitioners/Appellants	:	
vs.	:	
	:	
Utah Securities Division, and the	:	
Department of Business Regulation,	:	
	:	
Respondents/Appellees.	:	

**APPELLANTS' REPLY BRIEF
TO APPELLEES' BRIEF FILED IN OBJECTION TO APPELLANTS' PETITION
FOR WRIT OF CERTIORARI FROM DECISION OF THE UTAH COURT OF APPEALS
DATED FEBRUARY 10, 1992**

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CLERK SUPREME COURT
UTAH

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Utah Securities Division, and the	:	
Department of Business Regulation,	:	
	:	
Respondents/Appellees.	:	

APPELLANTS' REPLY BRIEF

As allowed by Rule 50(e), Utah Rules of Appellate Procedure, Appellants now submit the following Reply Brief to address arguments and matters first raised by the Appellees in their brief.

Appellants will address two separate points concerning the Appellee's brief.

(1) Appellees' counsel states many so-called facts in his brief and particularly on pages 2 and 3 of the brief (and in the footnotes). None of these statements make reference to the record. Many of the references in fact are not even in the record at all. This is improper appellate procedure and is an attempt to color the case against the Appellants by use of

matters that are not even properly before the Court, nor necessarily accurate.

(2) Appellees claim that although the Court of Appeals didn't deal with the issue of collateral estoppel directly it implied that the doctrine is a bar to the Appellants' defense and allowed the action of the Utah Securities Division to be affirmed. However, if the Court of Appeals would uphold the decision of a lower court, it should and must do so affirmatively rather than by way of a questionable implication. Rather, if any implications are to be drawn, the fair implication is that the Court of Appeals either didn't feel that collateral estoppel was a sufficient basis for the affirmance, or it decided that it didn't need to consider whether collateral estoppel applied or not since it opted to rule as it did on the other issues. The question became moot and it left the collateral estoppel argument alone.

Appellants submit in any event that the doctrine of collateral does not apply here for a several important reasons, summarized as follows:

Collateral estoppel cannot apply to the issue of the statutory authority of the Appellee inasmuch as Appellants never had the opportunity to fully litigate the argument that Section 61-1-20 of the Utah Code does not give statutory authority to suspend the trading of the stock of the various corporate Appellants, as discussed in the Petition for Writ of Certiorari.

The suggestion that Section 61-1-20 could give the necessary authority was only first raised by the Court of Appeals in its decision in Amenity. It was not an issue in the District Court nor before the Utah Securities Division. There has been no chance previous to this appeal to argue that that section of the Utah Code does not authorize the action taken by the Appellees (Originally in Amenity, the issue was whether Section 61-1-7 gave authority to the Appellee to suspend the trading exemptions).

It is also important to consider that this case is a completely separate proceeding involving different corporations and the suspension of their stock than were involved in Amenity. There was a separate evidentiary hearing with different witnesses and significantly different evidence on the good faith/bad faith gift issue.

This case is not in itself a relitigation of anything. Rather we have a question of whether once one, who is accused of illegal activity, loses in court thereafter forfeits his right to a hearing and judicial review when a second allegation of similar illegal conduct is alleged in a new case.

If Appellees' collateral estoppel argument is accepted, then a reviewing court is prevented from even considering the wording of the relevant statutes and evidence adduced at the hearing on this case, although similar allegations of violations

are involved, and the accused is thus prevented from his statutorily mandated right to judicial review.

The doctrine of collateral estoppel was never intended to go that far. If so, why even have the second hearing - if an administrative agency can win at the first hearing, all it would have to do thereafter is make new allegations of similar misconduct in another matter and the accused is left defenseless, even though the evidence may not be the same and mistakes in applying the statutes may have escaped attention previously.

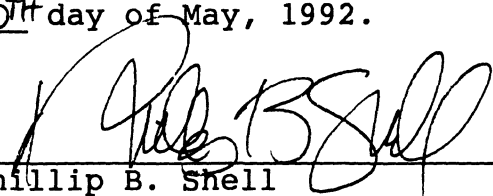
Appellants maintain that their Petition for Writ of Certiorari lists three very good reasons why the Supreme Court should exercise its power of supervision and review the decision of the Court of Appeals, despite Appellees' claim that Appellants' stated reasons didn't directly mirror the examples of reasons for granting a petition for Writ of Certiorari, as found in Rule 46, Utah Rules of Appellate Procedure.

Finally, it is instructive to consider that the Appellees' brief did not address or attempt to refute Appellants' argument that no section of the Utah Code authorizes the Utah Securities Division to take the action taken against the Appellants (Point One of the Petition for Writ of Certiorari). Appellees' reliance in its brief on specious technicalities and out of the record allegations certainly indicate, along with the failure to

address the issue at all, that Point One of the Appellants' Petition is correct and should be seriously considered by this Court in determining to accept this case for review.

The space limitations of this reply brief certainly do not allow for further discussion of the matter here. Yet, from a consideration of the Appellants' Petition, it is seen that this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted this 15th day of May, 1992.



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Attorneys for Appellants

CERTIFICATE OF MAILING

I certify that on this 15th day of May, 1992, I caused to be mailed a true and correct copy of the foregoing Appellants' Reply Brief, postage pre-paid, to the following:

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